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Total Number of Pages in This Submission: 61

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Filing Date	August 3, 2000
First Named Inventor	Katibian, et al.
Art Unit	2195
Examiner Name	Syed Ali
Attorney Docket Number	013629.00038

ENCLOSURES *(Check all that apply)*

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- ☐ Amendment/Reply
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NOTE: 3 copies of 20-page Appeal Brief are attached

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

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Date	March 31, 2006	Reg. No.	39,348

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AF/2195

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Appellant:	§	Conf. No. 9161
Katibian *et al.*	§	
Filed: August 3, 2000	§	Art Unit: 2195
Serial No.: 09/631,511	§	Examiner Syed Ali
For: SYSTEM AND METHOD FOR PROCESSING AUDIO AND VIDEO DATA IN A WIRELESS HANDSET	§	Docket No.: 13629.0038

APPEAL BRIEF

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TABLE OF CONTENTS

I. REAL PARTY OF INTEREST (37 C.F.R. § 1.192(c)(1)) 2

II. RELATED APPEALS AND INTERFERENCES (37 C.F.R. § 1.192(c)(2)) 2

III. STATUS OF CLAIMS (37 C.F.R. § 1.192(c)(3)) 2

A. TOTAL NUMBER OF CLAIMS IN APPLICATION 2

B. STATUS OF ALL THE CLAIMS 2

C. CLAIMS ON APPEAL 2

IV. STATUS OF AMENDMENTS (37 C.F.R. § 1.192(c)(4)) 3

V. SUMMARY OF THE CLAIMED SUBJECT MATTER (37 C.F.R. § 1.192(c)(5)) 3

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL (37 C.F.R. § 1.192(c)(6)) 8

VII. ARGUMENT (37 C.F.R. § 1.192(c)(7)) 8

1.0 THE EXAMINER HAS VIOLATED EXPLICIT AND LONG-STANDING CLAIM CONSTRUCTION RULES OF THE FEDERAL CIRCUIT BY IGNORING THE MEANS PLUS FUNCTION LIMITATION OF CONTROLLER MEANS FOR GENERATING PRIORITY DATA IN CLAIMS 21, 25, 26, 27, 28, AND 29 8

2.0 THE EXAMINER'S CONSTRUCTION OF TRANSMISSION BUFFER MEANS FOR RECEIVING THE PRIORITY DATA AND DATA FROM ONE OR MORE OF THE CHANNEL BUFFERS AND STORING THE DATA FROM THE CHANNEL BUFFERS IN A BUGGER IS LIKEWISE INCORRECT 11

3.0 THE EXAMINER'S CONSTRUCTION OF CLAIM 21 AS CONTAINING LIMITATIONS THAT ARE ALLEGEDLY OBVIOUS IN VIEW OF ROSTOKER, U.S. PATENT 6,111,863, READS LIMITATIONS OUT OF THE CLAIM 12

4.0 THE EXAMINER'S CONSTRUCTION OF CLAIM 31 AS CONTAINING LIMITATIONS THAT ARE ALLEGEDLY OBVIOUS IN VIEW OF ROSTOKER, READS LIMITATIONS OUT OF THE CLAIM 13

5.0 THE EXAMINER HAS IMPROPERLY REJECTED CLAIM 21 UNDER 35 U.S.C. 103(A) AS BEING UNPATENTABLE OVER ROSTOKER WHEN THE EXAMINER EXPRESSLY ALSO RELIES ON U.S. PATENT 6,728,795 TO FARAZMANDIA WITHOUT EXPLICITLY IDENTIFYING THAT SECOND REFERENCE AS A BASIS FOR THE REJECTION, AND WITHOUT ANY DISCUSSION OF WHY THERE WOULD BE A MOTIVATION TO COMBINE THOSE REFERENCES 15

VIII. CLAIMS APPENDIX ((37 C.F.R. § 1.192(c)(8)) 16

IX. EVIDENCE APPENDIX (37 C.F.R. § 1.192(c)(9)) 19

X. RELATED PROCEEDINGS APPENDIX 20

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING DEPOSITED WITH THE UNITED STATES POSTAL SERVICE AS FIRST CLASS MAIL IN AN ENVELOPE ADDRESSED TO: MAIL STOP APPEAL BRIEF-PATENTS, COMMISSIONER FOR PATENTS, P.O. BOX 1450, ALEXANDRIA, VIRGINIA 22313-1450, ON THE DATE INDICATED BELOW

BY: Lorraine Davidoff
Lorraine Davidoff

DATE: March 31, 2006

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re:	Patent Application of Katibian et. al	:Group Art Unit: 2195
Appln. No.:	09/631,511	:Examiner: Syed Ali
Filed:	August 3, 2000	
For:	SYSTEM AND METHOD FOR PROCESSING AUDIO AND VIDEO DATA IN A WIRELESS HANDSET	: Attorney Docket : No. 13629.0038

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APPELLANT'S BRIEF (37 C.F.R. § 1.192)

This brief is in furtherance of the Notice of Appeal, filed in this case on January 31, 2006 and reportedly received by the U.S. Patent and Trademark Office on January 28, 2006 according to the USPTO Private Pair transaction history.

The fees required under § 1.17 are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief is transmitted in triplicate. (37 C.F.R. § 1.192(a)).

This brief contains these items under the following headings, and in the order set forth below (37 C.F.R. § 1.192(c)).

I. REAL PARTY IN INTEREST

II. RELATED APPEALS AND INTERFERENCES

III. STATUS OF CLAIMS

IV. STATUS OF AMENDMENTS

V. SUMMARY OF CLAIMED SUBJECT MATTER

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

VII. ARGUMENT

VIII. CLAIMS APPENDIX

IX. EVIDENCE APPENDIX

X. RELATED PROCEEDINGS APPENDIX

The final page of this brief bears the practitioner's signature.

I. REAL PARTY OF INTEREST (37 C.F.R. § 1.192(c)(1))

The real party in interest in this appeal is Skyworks Solutions, Inc.

II. RELATED APPEALS AND INTERFERENCES (37 C.F.R. § 1.192(c)(2))

There are no appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in this appeal.

III. STATUS OF CLAIMS (37 C.F.R. § 1.192(c)(3))

The status of the claims in this application is:

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 20 claims. (Claims 21-29, 31-39, 41 and 43)

B. STATUS OF ALL THE CLAIMS

1. Claims allowed: NONE.
2. Claims rejected: 21-29, 31-39, 41 and 43.
3. Claims cancelled: 1-20, 30, 40, and 42

C. CLAIMS ON APPEAL

The claims on appeal are: 21-29, 31-39, 41 and 43.

IV. STATUS OF AMENDMENTS (37 C.F.R. § 1.192(c)(4))

The claims presently pending are those submitted August 16, 2005 in response to the non-final Office Action dated May 16, 2005 (paper no. 20050510).

V. SUMMARY OF THE CLAIMED SUBJECT MATTER (37 C.F.R. § 1.192(c)(5))

The following summary is provided without any intention to limit the scope of the claims. The subject matter of claims 21-29, 31-39, 41 and 43 is summarized below.

Claims 1-20 have been cancelled without prejudice or disclaimer.

Claim 21 includes a system for processing audio and video data for a wireless handset comprising controller means such as controller 108 and its related systems such as logical channel controller 202, multiplex system 204 (and its associated systems data adaptation layer system 502, multiplex layer system 508, audio adaptation layer system 506 and video adaptation layer system 504), digital image rate controller 206, audio sample rate controller 208, framing system 210 and transmission protocol system 212 (and its associated systems multiplex code system 402, error control system 404, packet marker system 406 and flag system 408), as well as the algorithms embodied in methods 700, 800, 900 and 1000 (see associated description at pages 8-9, 11-16, 18-23, and 24-32) for generating priority data, a plurality of channel buffers such as channel buffer system 304 and methods 800 and 900 (see associated description at pages 16-18 and 26-30) wherein each channel buffer represents a logically separate channel of data; and transmission buffer means such as transmission buffer 302 and methods 800 and 900 (see associated description at pages 16-18 and 26-30) for receiving the priority data and data from one or more of the channel buffers and storing the data from the channel buffers in a buffer, where the number of channel buffers to receive data from and the amount of data to be received from each channel buffer is determined by the priority data.

Claim 22 includes the system of claim 21 wherein the plurality of channel buffers further comprises an audio data buffer such as channel buffer system 304 and methods 800 and 900 (see associated description at pages 16-18 and 26-30).

Claim 23 includes the system of claim 21 wherein the plurality of channel buffers further comprises a video data buffer such as channel buffer system 304 and methods 800 and 900 (see associated description at pages 16-18 and 26-30).

Claim 24 includes the system of claim 21 wherein the plurality of channel buffers further comprises a control data buffer such as channel buffer system 304 and methods 800 and 900 (see associated description at pages 16-18 and 26-30).

Claim 25 includes the system of claim 21 wherein the controller means generates priority data based on transmission channel bandwidth such as controller 108 and its related systems such as logical channel controller 202, multiplex system 204 (and its associated systems data adaptation layer system 502, multiplex layer system 508, audio adaptation layer system 506 and video adaptation layer system 504), digital image rate controller 206, audio sample rate controller 208, framing system 210 and transmission protocol system 212 (and its associated systems multiplex code system 402, error control system 404, packet marker system 406 and flag system 408), as well as the algorithms embodied in methods 700, 800, 900 and 1000 (see associated description at pages 8-9, 11-16, 18-23, and 24-32).

Claim 26 includes the system of claim 21 wherein the controller means generates priority data based on processor capacity of a wireless handset processor such as controller 108 and its related systems such as logical channel controller 202, multiplex system 204 (and its associated systems data adaptation layer system 502, multiplex layer system 508, audio adaptation layer system 506 and video adaptation layer system 504), digital image rate controller 206, audio sample rate controller 208, framing system 210 and transmission protocol system 212 (and its associated systems multiplex code system 402, error control system 404, packet marker system 406 and flag system 408), as well as the algorithms embodied in methods 700, 800, 900 and 1000 (see associated description at pages 8-9, 11-16, 18-23, and 24-32).

Claim 27 includes the system of claim 21 and wherein the plurality of channel buffers such as channel buffer system 304 and methods 800 and 900 (see associated description at pages 16-18 and 26-30) further comprises an audio data buffer, a video data buffer and a control data buffer; and wherein the controller means such as controller 108 and its related systems such as logical channel controller 202, multiplex system 204 (and its associated systems data adaptation layer system 502, multiplex layer system 508, audio adaptation layer system 506 and video

adaptation layer system 504), digital image rate controller 206, audio sample rate controller 208, framing system 210 and transmission protocol system 212 (and its associated systems multiplex code system 402, error control system 404, packet marker system 406 and flag system 408), as well as the algorithms embodied in methods 700, 800, 900 and 1000 (see associated description at pages 8-9, 11-16, 18-23, and 24-32) generates priority data based on transmission channel bandwidth and on processor capacity of a wireless handset processor that changes the amount and sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is stored in the transmission buffer means such as transmission buffer 302 and methods 800 and 900 (see associated description at pages 16-18 and 26-30).

Claim 28 includes the system of claim 21 wherein the controller means such as controller 108 and its related systems such as logical channel controller 202, multiplex system 204 (and its associated systems data adaptation layer system 502, multiplex layer system 508, audio adaptation layer system 506 and video adaptation layer system 504), digital image rate controller 206, audio sample rate controller 208, framing system 210 and transmission protocol system 212 (and its associated systems multiplex code system 402, error control system 404, packet marker system 406 and flag system 408), as well as the algorithms embodied in methods 700, 800, 900 and 1000 (see associated description at pages 8-9, 11-16, 18-23, and 24-32) receives user control data and uses the user control data to generate the priority data.

Claim 29 includes the system of claim 27 wherein the controller means such as controller 108 and its related systems such as logical channel controller 202, multiplex system 204 (and its associated systems data adaptation layer system 502, multiplex layer system 508, audio adaptation layer system 506 and video adaptation layer system 504), digital image rate controller 206, audio sample rate controller 208, framing system 210 and transmission protocol system 212 (and its associated systems multiplex code system 402, error control system 404, packet marker system 406 and flag system 408), as well as the algorithms embodied in methods 700, 800, 900 and 1000 (see associated description at pages 8-9, 11-16, 18-23, and 24-32) receives user control data and uses the user control data to generate the priority data that changes the amount and sequence of data from the audio data buffer, the video data buffer, and the control data buffer such as channel buffer system 304 and methods 800 and 900 (see associated description at pages

16-18 and 26-30) that is stored in the transmission buffer means such as transmission buffer 302 and methods 800 and 900 (see associated description at pages 16-18 and 26-30).

Claim 30 has been cancelled without prejudice or disclaimer.

Claim 31 includes a method for processing audio and video data for a wireless handset comprising generating priority data, storing data in a plurality of channel buffers, where each channel buffer represents a logically separate channel of data, determining the number of channel buffers to receive data from based on the priority data, determining the amount of data to be received from each channel buffer by the priority data, and storing the data from each selected channel buffer in a transmission buffer, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 32 includes the method of claim 31 wherein storing data in the plurality of channel buffers further comprises storing the data in an audio data buffer, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 33 includes the method of claim 31 wherein storing data in the plurality of channel buffers further comprises storing the data in a video data buffer, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 34 includes the method of claim 31 wherein storing data in the plurality of channel buffers further comprises storing the data in a control data buffer, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 35 includes the method of claim 31 wherein generating priority data comprises generating priority data based on transmission channel bandwidth, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 36 includes the method of claim 31 wherein generating priority data comprises generating priority data based on processor capacity of a wireless handset processor, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 37 includes a method for processing audio and video data for a wireless handset comprising generating priority data based on transmission channel bandwidth and on processor capacity of a wireless handset processor, storing data in an audio data buffer, storing data in a video data buffer, storing data in a control data buffer, determining a number of channel buffers to receive data from based on the priority data, determining an amount and a sequence of data

from the audio data buffer, the video data buffer, and the control data buffer that is to be stored in a transmission buffer based on the priority data, and storing the data from each selected channel buffer in the transmission buffer, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 38 includes the method of claim 37 further comprising receiving user-entered control data, and generating the priority data from the user-entered control data, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 39 includes the method of claim 37 further comprising receiving user control data and generating priority data that changes the amount and sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is stored in the transmission buffer from the user control data, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

Claim 40 has been cancelled without prejudice or disclaimer.

Claim 41 includes the system of claim 27 further comprising priority data associated with each channel buffer, wherein audio data can have a lower priority than video data or control data, such as described in relation to controller 108 and its related systems such as logical channel controller 202, multiplex system 204 (and its associated systems data adaptation layer system 502, multiplex layer system 508, audio adaptation layer system 506 and video adaptation layer system 504), digital image rate controller 206, audio sample rate controller 208, framing system 210 and transmission protocol system 212 (and its associated systems multiplex code system 402, error control system 404, packet marker system 406 and flag system 408), as well as the algorithms embodied in methods 700, 800, 900 and 1000 (see associated description at pages 8-9, 11-16, 18-23, and 24-32).

Claim 43 includes the method of claim 37 wherein determining the amount and the sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is to be stored in the transmission buffer based on the priority data further comprises allowing only null data from one of the audio data buffer, the video data buffer, or the control data buffer to be stored in the transmission buffer if the associated buffer is empty, priority is allocated only to the associated buffer, and data is present in the other buffers, such as shown in methods 700, 800, 900 and 1000 (see associated description at pages 24-32).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL (37 C.F.R. § 1.192(c)(6))

1.0 Whether the Examiner has violated explicit and long-standing claim construction rules of the Federal Circuit by ignoring the means plus function limitation of controller means for generating priority data in claims 21, 25, 26, 27, 28, and 29.

2.0 Whether the Examiner's construction of transmission buffer means for receiving the priority data and data from one or more of the channel buffers and storing the data from the channel buffers in a buffer is likewise incorrect.

3.0 Whether the Examiner's construction of claim 21 as containing limitations that are allegedly obvious in view of Rostoker, U.S. Patent 6,111,863, reads limitations out of the claim.

4.0 Whether the Examiner's construction of claim 31 as containing limitations that are allegedly obvious in view of Rostoker, reads limitations out of the claim.

5.0 Whether the Examiner has improperly rejected claim 21 under 35 U.S.C. 103(a) as being unpatentable over Rostoker when the Examiner expressly also relies on U.S. Patent 6,728,795 to Farazmandia without explicitly identifying that second reference as a basis for the rejection, and without any discussion of why there would be a motivation to combine those references.

VII. ARGUMENT (37 C.F.R. § 1.192(c)(7))

1.0 THE EXAMINER HAS VIOLATED EXPLICIT AND LONG-STANDING CLAIM CONSTRUCTION RULES OF THE FEDERAL CIRCUIT BY IGNORING THE MEANS PLUS FUNCTION LIMITATION OF CONTROLLER MEANS FOR GENERATING PRIORITY DATA IN CLAIMS 21, 25, 26, 27, 28, AND 29.

In the final office action mailed October 31, 2005, the Examiner asserts that "Rostoker fulfills both the means and function requirements of the claim." The Examiner then discusses Rostoker, but ***never even refers to the structure disclosed in the specification***. This is legal error. As noted in M.P.E.P. 2181.II, 35 U.S.C. 112, sixth paragraph states that a claim limitation expressed in means plus function language "shall be construed to cover the corresponding structure . . . described in the specification and equivalents thereof." As further noted in

M.P.E.P. 2182, citing to *Golight Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1333-34 (Fed. Cir. 2004), the first step in construing a means plus function claim is to define the particular function of the claim limitation. The next step is to look to the specification and identify the corresponding structure for that function. While it is questionable whether the Examiner has performed the first step, it is clear that the second step is entirely missing from the final office action.

Furthermore, special rules apply to means that can be implemented in software, *see WMS Gaming, Inc. v. Int'l Game Technology, 184 F.3d 1339, 1349* (Fed. Cir. 1999), which holds:

> In a means-plus-function claim in which the disclosed structure is a computer, or microprocessor, programmed to carry out an algorithm, the disclosed structure is not the general purpose computer, but rather the special purpose computer programmed to perform the disclosed algorithm.

The "special purpose computer" results from the computer being "programmed to perform particular functions pursuant to instructions from program software." Id. at 1348. In the present case, with both hardware and software means disclosed, it is necessary for the Examiner to identify the structure disclosed in the specification and then determine whether the cited art discloses that structure or an equivalent thereof. The Examiner did not perform this analysis and indeed cannot, because Rostoker entirely fails to disclose either the hardware or software structure.

Claim 21 includes controller means for generating priority data. The structure corresponding to the controller means includes controller 108 and its related systems such as logical channel controller 202, multiplex system 204 (and its associated systems data adaptation layer system 502, multiplex layer system 508, audio adaptation layer system 506 and video adaptation layer system 504), digital image rate controller 206, audio sample rate controller 208, framing system 210 and transmission protocol system 212 (and its associated systems multiplex code system 402, error control system 404, packet marker system 406 and flag system 408), as well as the algorithms embodied in methods 700, 800, 900 and 1000 (see associated description at pages 8-9, 11-16, 18-23, and 24-32).

In contrast, the controller means of Rostoker, per the Examiner, is disclosed at col. 4, lines 30-32, which reads in its entirety "In addition to those well known operations, the controller 22 allocates the RF bandwidth among the audio, video and data signals." Not only does the

controller of Rostoker fail to generate priority data, it fails to correspond to the structure disclosed in the specification for generating priority data. For example, controller 108 includes logical channel controller, as shown in Figure 2 and described at pages 12-13 of the specification, which generates priority data to assign a logical relationship between channels. Likewise, controller 108 includes multiplex system 204, described at pages 13-14 of the specification, which can generate priority data to assign predetermined service data packets based on the amount of bandwidth available, the quality of audio and video control data selected, or other listed parameters. None of this structure is disclosed or even suggested by Rostoker.

Likewise, in regards to the algorithm disclosed in exemplary Figure 7 for controller means for generating priority data, the only algorithm disclosed in Rostoker is in Figure 3. As can be clearly seen, that algorithm does not even include the first step shown in Figure 7 at 702 – "receive priority control." Although it does include the "request" step at 332, it is disclosed at col. 6, lines 52-55, that priority is incrementally changed in steps until the request has stopped. This is not the same or an equivalent structure to that shown in Figure 7, which does not perform any such incremental change until a request is stopped. Furthermore, Rostoker utterly fails to disclose the additional controller means for generating priority data, such as "set multiplex table to audio priority entry" 706, "set audio processing priority" 710, "set multiplex table to video priority entry" 712, and "set video processing priority" 716. Regardless of whether the Examiner failed to understand the proper way to examine means plus function limitations or failed to do so because Rostoker fails to disclose the same or equivalent structure, the rejection is improper and must be reversed.

If the Examiner believes that Rostoker discloses the same or equivalent structure for this means plus function element and presents arguments as to such in response to this appeal brief, Applicants reserve the right to address such arguments. However, given that the Examiner's final rejection utterly fails to address this means plus function element, the burden of demonstrating that Rostoker anticipates claims 21 and 25-29 remains with the Examiner, and if the Examiner fails to provide a prima facie basis for rejecting claims 21 and 25-29, then all such claims as well as any claims that depend therefrom must be allowed.

2.0 THE EXAMINER'S CONSTRUCTION OF TRANSMISSION BUFFER MEANS FOR RECEIVING THE PRIORITY DATA AND DATA FROM ONE OR MORE OF THE CHANNEL BUFFERS AND STORING THE DATA FROM THE CHANNEL BUFFERS IN A BUFFER IS LIKEWISE INCORRECT.

In addition to control means, claim 21 includes transmission buffer means for receiving the priority data and data from one or more of the channel buffers and storing the data from the channel buffers in a buffer, where the number of channel buffers to receive data from and the amount of data to be received from each channel buffer is determined by the priority data. The structure corresponding to the transmission buffer means includes transmission buffer 302 and methods 800 and 900 (see associated description at pages 16-18 and 26-30).

The Examiner again fails to identify any structure in the specification, but asserts that the transmission buffer means is variously disclosed in Rostoker at col. 4, lines 47-58 and col. 5, lines 24-32. These buffers are shown in Figure 2 as FIFO 23a, which is dedicated to video data, FIFO 23b which is dedicated to audio data, and FIFO buffer 23c, which is dedicated to "data," each of which are contained within controller 22. In contrast, the structure disclosed in the specification of the pending application includes a controller 108 that is separate from data buffer system 114, which further includes transmission buffer system 302 and channel buffer system 304, with channels a through n. Likewise, the transmission buffer means includes algorithms shown in Figures 8 and 9. There is no equivalent to the algorithms in Figures 8 and 9 in Rostoker.

If the Examiner believes that Rostoker discloses the same or equivalent structure for this means plus function element and presents arguments as to such in response to this appeal brief, Applicants reserve the right to address such arguments. However, given that the Examiner's final rejection utterly fails to address this means plus function element, the burden of demonstrating that Rostoker anticipates claims 21, 27 and 29 remains with the Examiner, and if the Examiner fails to provide a prima facie basis for rejecting claims 21, 27 29, then all such claims as well as any claims that depend therefrom must be allowed.

3.0 THE EXAMINER'S CONSTRUCTION OF CLAIM 21 AS CONTAINING LIMITATIONS THAT ARE ALLEGEDLY OBVIOUS IN VIEW OF ROSTOKER, U.S. PATENT 6,111,863, READS LIMITATIONS OUT OF THE CLAIM.

Claim 21 includes transmission buffer means for receiving the priority data and data from one or more of the channel buffers and storing the data from the channel buffers in a buffer, where the number of channel buffers to receive data from and the amount of data to be received from each channel buffer is determined by the priority data. The Examiner asserts that it would be obvious to modify the transmitter of Rostoker to provide this element, but in fact relies on an additional reference (discussed below) as support for this missing element. In any event, construing this element of claim 21 as being anticipated by Rostoker, even if modified to include a transmission buffer, reads limitations out of the claim.

As previously discussed, claim 21 includes a means plus function limitation of transmission buffer means for receiving the priority data and data from one or more of the channel buffers and storing the data from the channel buffers in a buffer, where the number of channel buffers to receive data from and the amount of data to be received from each channel buffer is determined by the priority data. Transmitter 18 of Rostoker receives data from all three data buffers of controller 22 based on what is transmitted from controller 22, and compresses the audio and video data using blocks 102 and 104. The compressed data is broken up into transmit packets by blocks 106 and 108, as well as uncompressed data by block 110. The data is then multiplexed by block 112, and header data is provided from controller 22. Thus, there is simply no way to include the transmission buffer means that receives the priority data **and** the data from the one or more of the channel buffers, where the number of channel buffers to receive data from and the amount of data to be received from each channel buffer is determined by the priority data. Only the controller 22 of Rostoker provides that function, and simply placing a buffer in transmitter 18 at some arbitrary location would not provide each claim limitation, contrary to Federal Circuit law. *See. Asyst Techs., Inc. v. Emtrak, Inc.*, 402 F.3d 1188, 1195 (Fed. Cir. 2005) ("To hold that `unmounted' is equivalent to `mounted' would effectively read the `mounted on' limitation out of the patent."). As such, the construction of claim 21 as being anticipated by Rostoker is improper, and must be overruled.

4.0 THE EXAMINER'S CONSTRUCTION OF CLAIM 31 AS CONTAINING LIMITATIONS THAT ARE ALLEGEDLY OBVIOUS IN VIEW OF ROSTOKER, READS LIMITATIONS OUT OF THE CLAIM.

Claim 31 includes five method steps, including 3) determining the number of channel buffers to receive data from based on the priority data, 4) determining the amount of data to be received from each channel buffer by the priority data, and 5) storing the data from each selected channel buffer in a transmission buffer. As discussed in the response mailed August 16, 2005 to the office action mailed May 16, 2005 at pages 6-7, these elements are not present in Rostoker, and any claim construction that results in Rostoker anticipating claim 31 necessarily reads elements out of the claim. In response to Applicant's arguments, the Examiner incorporates limitations from the specification to read explicit limitations out of the claim, contrary to Federal Circuit law. E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co., 849 F.2d 1430, 1433 (Fed. Cir. 1988). Indeed, it is remarkable that the Examiner, who was unable to follow Federal Circuit law by identifying structure in the specification for means plus function clauses, is able to find a single exemplary embodiment in the specification that does not even relate to the claim limitations in dispute, and to import that exemplary embodiment onto the narrower claim limitations so as to read those claim elements out of the claim.

As noted in the response mailed August 16, 2005, Rostoker fails to disclose determining the number of channels to receive data from based on priority data, as there are only three channels in Rostoker – no more, no less. In fact, the Examiner simply dismisses this claim limitation at paragraph 29 of the final office action mailed October 31, 2005 – "[w]hether Rostoker determines the amount of data to receive based on an allocation of bandwidth, a number of bytes, or any other factor has no bearing on the fact that Rostoker discusses taking data from the buffers in a hierarchical manner, i.e. as designated by the priority data." Unfortunately, the Examiner is wrong, and forces the Applicants to appeal this rejection to the Board. The explicit wording of the claim requires determining the number of channels to receive data from based on priority data, not "taking data from the buffers in a hierarchical manner, i.e. as designated by the priority data." The number of buffers from which the data is taken in Rostoker is always three. There is no determining. The Examiner's construction of step 3 is incorrect.

Likewise, the Examiner improperly construes step 4, which includes determining the amount of data to be received from each channel buffer by the priority data. Rostoker does not do this – it allocates bandwidth, such that if a first buffer has priority 1 and the other two have priority 0, data is always taken from the first buffer until it runs out, then data is taken equally from the other two buffers until data appears in the first buffer again, at which point no more data is taken from the other buffers until all of the data is taken from the first buffer. There is simply no determination of the amount of data to be received from each channel buffer by the priority data. How does the Examiner justify his construction? By equating the claim with an exemplary embodiment in the specification – "[p]roviding one data type with a primary priority and the other data type(s) with secondary priority is perfectly consistent with the embodiment of Applicant's invention shown at pg. 9 line 30 – pg. 10 line 14 of the Specification." Notably, that section of the specification does not even discuss determining the number of channel buffers to receive data from based on the priority data, determining the amount of data to be received from each channel buffer by the priority data, or storing the data from each selected channel buffer in a transmission buffer. Furthermore, as previously discussed, Rostoker does not even disclose storing data from each selected channel buffer in a transmission buffer, a point discussed at greater length below. As the Examiner imports limitations from the specification to construe claim 31 so as to read explicit limitations out of the claim, the Examiner's construction and rejection must be reversed.

In regards to claim 37, Rostoker likewise fails to disclose determining a number of channel buffers to receive data from based on the priority data, determining an amount and a sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is to be stored in a transmission buffer based on the priority data; and storing the data from each selected channel buffer in the transmission buffer. As the Examiner relies on the same cited sections from Rostoker for the rejection of these claim elements as for claim 31, it is apparent that the same flawed construction is used to reject claim 37. It is noted, however, that claim 37 requires determining an amount and a sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is to be stored in a transmission buffer based on the priority data, whereas Rostoker only discloses that data is transmitted as it is received based on priority, without any determination an amount and a sequence of data from the audio data buffer,

the video data buffer, and the control data buffer that is to be stored in a transmission buffer (which isn't even disclosed in Rostoker) based on the priority data.

In regards to claim 43, as that claim depends from claim 37, which is allowable as properly construed, claim 43 is likewise allowable. The Applicants note, however, that Leavy is drawn to a mixing apparatus for mixing media in a multi-media environment, and is not even in the same class as Rostoker. It is further noted that the cited section of Leavy does not pertain to a transmitter, and that the terms "transmission buffer" or "transmitter buffer" are not used in Leavy. Leavy is non-analogous art which only discusses aspects of the claimed invention in areas that are unrelated to the claimed invention (i.e., mixing of audiovisual data, and not the processing audio and video data for a wireless handset). The Examiner has previously had to withdraw claim rejections for citing non-analogous art against the claims, see, e.g., Office Action mailed July 6, 2004, in response to Request for Reconsideration mailed April 26, 2004, in which it was noted that the cited art did not relate to generating audiovisual data, but only to receiving audiovisual data.

5.0 THE EXAMINER HAS IMPROPERLY REJECTED CLAIM 21 UNDER 35 U.S.C. 103(A) AS BEING UNPATENTABLE OVER ROSTOKER WHEN THE EXAMINER EXPRESSLY ALSO RELIES ON U.S. PATENT 6,728,795 TO FARAZMANDIA WITHOUT EXPLICITLY IDENTIFYING THAT SECOND REFERENCE AS A BASIS FOR THE REJECTION, AND WITHOUT ANY DISCUSSION OF WHY THERE WOULD BE A MOTIVATION TO COMBINE THOSE REFERENCES.

In response to the Response to Office Action mailed February 28, 2005, the Examiner maintained the rejection of claims 21-29, 31-39 and 41 under 35 U.S.C. 103(a) as being unpatentable over Rostoker, but cited new art against the claims to support the rejection, namely, Farazmandia et. al, U.S. 6,728,795. It is clear why the Examiner did so – otherwise, the rejection would need to be non-final, and the Examiner would be deprived of an extra "point" for disposing of a case. However, as these claims have been improperly rejected through six office actions, the Applicants elect to appeal the rejection as if the Examiner had properly cited Farazmandia against the claims and made the rejection non-final.

Furthermore, it is noted that the one to two byte buffer of Farazmandia when combined with Rostoker still fails to disclose the claimed transmission buffer means for receiving the priority data and data from one or more of the channel buffers and storing the data from the channel buffers in a buffer, where the number of channel buffers to receive data from and the amount of data to be received from each channel buffer is determined by the priority data. For the reasons described above, there is no way for that buffer to receive the priority data, and even if it did, the structure disclosed in the specification of the pending application or any equivalent thereof is not found in any combination of Rostoker and Farazmandia. The Applicants reserve the right to respond to any attempt by the Examiner to argue otherwise, but as the Examiner has failed to provide a prima facie basis for the rejection of the means plus function claim elements, the Examiner's flawed construction must be reversed if no such prima facie basis is provided.

VIII. CLAIMS APPENDIX (37 C.F.R. § 1.192(c)(8))

The text of the claims involved in the appeal is as follows:

Claims 1-20 (cancelled).

21. (Previously presented) A system for processing audio and video data for a wireless handset comprising:

controller means for generating priority data;

a plurality of channel buffers, wherein each channel buffer represents a logically separate channel of data; and

transmission buffer means for receiving the priority data and data from one or more of the channel buffers and storing the data from the channel buffers in a buffer, where the number of channel buffers to receive data from and the amount of data to be received from each channel buffer is determined by the priority data.

22. (Previously presented) The system of claim 21 wherein the plurality of channel buffers further comprises an audio data buffer.

23. (Previously presented) The system of claim 21 wherein the plurality of channel buffers further comprises a video data buffer.

24. (Previously presented) The system of claim 21 wherein the plurality of channel buffers further comprises a control data buffer.

25. (Previously presented) The system of claim 21 wherein the controller means generates priority data based on transmission channel bandwidth.

26. (Previously presented) The system of claim 21 wherein the controller means generates priority data based on processor capacity of a wireless handset processor.

27. (Previously presented) The system of claim 21 further comprising:

wherein the plurality of channel buffers further comprises:

an audio data buffer;

a video data buffer; and

a control data buffer; and

wherein the controller means generates priority data based on transmission channel bandwidth and on processor capacity of a wireless handset processor that changes the amount and sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is stored in the transmission buffer means.

28. (Previously presented) The system of claim 21 wherein the controller means receives user control data and uses the user control data to generate the priority data.

29. (Previously presented) The system of claim 27 wherein the controller means receives user control data and uses the user control data to generate the priority data that changes the amount and sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is stored in the transmission buffer means.

Claim 30 (cancelled).

31. (Previously presented) A method for processing audio and video data for a wireless handset comprising:

generating priority data;

storing data in a plurality of channel buffers, where each channel buffer represents a logically separate channel of data; and

determining the number of channel buffers to receive data from based on the priority data;

determining the amount of data to be received from each channel buffer by the priority data; and

storing the data from each selected channel buffer in a transmission buffer.

32. (Previously presented) The method of claim 31 wherein storing data in the plurality of channel buffers further comprises storing the data in an audio data buffer.

33. (Previously presented) The method of claim 31 wherein storing data in the plurality of channel buffers further comprises storing the data in a video data buffer.

34. (Previously presented) The method of claim 31 wherein storing data in the plurality of channel buffers further comprises storing the data in a control data buffer.

35. (Previously presented) The method of claim 31 wherein generating priority data comprises generating priority data based on transmission channel bandwidth.

36. (Previously presented) The method of claim 31 wherein generating priority data comprises generating priority data based on processor capacity of a wireless handset processor.

37. (Previously presented) A method for processing audio and video data for a wireless handset comprising:

generating priority data based on transmission channel bandwidth and on processor capacity of a wireless handset processor;

storing data in an audio data buffer;

storing data in a video data buffer;

storing data in a control data buffer;

determining a number of channel buffers to receive data from based on the priority data;

determining an amount and a sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is to be stored in a transmission buffer based on the priority data; and

storing the data from each selected channel buffer in the transmission buffer.

38. (Previously presented) The method of claim 37 further comprising:

receiving user-entered control data; and

generating the priority data from the user-entered control data.

39. (Previously presented) The method of claim 37 further comprising:

receiving user control data; and

generating priority data that changes the amount and sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is stored in the transmission buffer from the user control data.

Claim 40 (cancelled).

41. (Previously presented) The system of claim 27 further comprising priority data associated with each channel buffer, wherein audio data can have a lower priority than video data or control data.

Claim 42 (cancelled).

43. (Previously presented) The method of claim 37 wherein determining the amount and the sequence of data from the audio data buffer, the video data buffer, and the control data buffer that is to be stored in the transmission buffer based on the priority data further comprises allowing only null data from one of the audio data buffer, the video data buffer, or the control data buffer to be stored in the transmission buffer if the associated buffer is empty, priority is allocated only to the associated buffer, and data is present in the other buffers.

IX. EVIDENCE APPENDIX (37 C.F.R. § 1.192(c)(9))

None

X. RELATED PROCEEDINGS APPENDIX (37 C.F.R. § 1.192(c)(10))

None.

Respectfully(submitted,

By: _____

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